Supreme Court No. 200,606-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

S. RICHARD HICKS,

Lawyer (Bar No. 6612).

ANSWERING BRIEF OF THE WASHINGTON STATE BAR ASSOCIATION

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I. COUNTERSTATEMENT OF THE ISSUES

1. In response to a request for information in the course of a disciplinary investigation, Respondent submitted written statements that, according to the hearing officer's unchallenged findings of fact, were contrary to fact. According to his own admissions and the unchallenged findings of fact, Respondent "fudged things" to avoid detection of his ethical misconduct. Do the unchallenged findings of fact support the conclusion of the hearing officer and the Disciplinary Board that Respondent violated Rule 8.4(c) of the Rules of Professional Conduct (RPC) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation?

2. Do the same unchallenged findings of fact support the conclusion of the hearing officer and the Disciplinary Board that Respondent violated Rule 5.3(e)(1) of the Rules for Enforcement of Lawyer Conduct (ELC) by failing to cooperate in a disciplinary investigation?

3. Under ABA Standards std. 7.1, the presumptive sanction is disbarment when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a personal benefit for himself or another. The unchallenged findings of fact establish that Respondent acted knowingly to obtain a personal benefit for

himself by avoiding detection of his ethical misconduct. Is the presumptive sanction disbarment under ABA Standards std. 7.1?

4. In In re Disciplinary Proceeding Against Whitt, a similar case in which a lawyer intended to deceive the disciplinary authority by making false and misleading representations in the course of an investigation, this Court rejected the Disciplinary Board's recommendation of a two-year suspension in favor of disbarment. Should this Court follow its own precedent and impose the same sanction in this case?

II. COUNTERSTATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

In early 2004, Respondent's business and personal bank accounts were closed as a result of overdrafts. TR 85. In June 2004, Respondent moved in with his friend SB, who helped him pay his bills. TR 87. Although Respondent knew that he could use SB's checking account to write checks for his personal and business expenses, he chose to use his lawyer trust account instead. TR 87. From May 2004 through July 2005, Respondent used his lawyer trust account for his personal and business expenses, as well as for transactions involving client funds. Amended Findings of Fact, Conclusions of Law and Hearing Officer's

Recommendation[1] (AFFCL) ¶ 15; TR 62, 87-88; EX 7 at 4. During that period, Respondent deposited at least $45,000 of his personal funds in his lawyer trust account, and he paid at least $38,000 in personal expenses from that account. AFFCL ¶¶ 16-17; EX 7 at 4. Respondent admitted that he knew he was commingling his own funds and those of his clients, and he admitted that he knew it was wrong. TR 84, 115. Nevertheless, on March 25, 2005, Respondent signed the annual trust account declaration required by ELC 15.5(a), certifying under penalty of perjury that he was maintaining his trust account in compliance with RPC 1.14.[2] TR 88-90.

On January 13, 2005, Respondent wrote a check for $300 from his lawyer trust account to SB. AFFCL ¶ 51; TR 55-56, 58; EX 12 at 43, 46. At that time, all of the funds in Respondent's lawyer trust account were Respondent's own funds. AFFCL ¶ 56; TR 53, 95-96, 142-43; EX 7 at 2. There were no client funds in the account. AFFCL ¶ 56; TR 53, 95-96, 142-43; EX 7 at 2. Although Respondent represented SB in a bankruptcy case between November 2004 and February 2005, the $300 that he paid to her from his lawyer trust account were not client funds and were not related in any way to his representation of her. AFFCL ¶ 55-56; TR 95-

[1] The Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation are at BF 58.

[2] The RPC were amended effective September 1, 2006. All references herein are to the RPC in effect at the time of the misconduct.

96, 114, 116-17. Respondent was living with SB at the time, he was paying some of her bills and household expenses every month, and the $300 that he paid her from his lawyer trust account was "probably for the car payment." TR 116, 143.

The balance in Respondent's lawyer trust account was not enough to cover the $300 check that he wrote to SB for the car payment, and on January 21, 2005, the Washington State Bar Association (Association) received an overdraft notice from Respondent's bank under ELC 15.4. AFFCL ¶ 51; TR 20; EX 10A. The Association opened a grievance file, and on January 25, 2005, the Association's auditor sent Respondent a copy of the overdraft notice along with a formal request for response. AFFCL ¶52; TR 50-51; EX 1. The auditor informed Respondent that the matter was under investigation, and she requested a "complete explanation" of the overdraft:

> Enclosed is a copy of a Trust Account Overdraft Notice received by the Association. This matter has been assigned to me for investigation. Pursuant to Rule 15.4(d) of the Rules for Enforcement of Lawyer Conduct (ELC), please provide a complete explanation of the overdraft. A copy of ELC 15.4 is enclosed for your information. Please provide supporting documentation with your explanation.

EX 1.

On January 28, 2005, Respondent responded as follows:

> This is in response to your Trust Account Overdraft notification of January 25, 2005 for account No. 1-535-0007-2936 U.S. Bank.
>
> The overdraft occurred as a result of an oversight, in failing to record into the computer, a check drawn against the account and thereafter making a separate check payment to a client which caused the overdraft of the account. The bank honored the check and assessed a $30 fee. At the time of the overdraft, the only funds in the account belonged to the one client and all payments were to or for the benefit of that client. I subsequently made a deposit to the account to cover the overdraft and the charges and have reviewed the account to make sure that there were no other oversights.

AFFCL ¶ 53; TR 51; EX 2.

That response was misleading and contrary to fact in the following respects:

- Respondent was not recording any of his trust account transactions on a computer at that time. AFFCL ¶ 54; TR 32-33, 94, 186-87; EX 16F.

- The $300 payment to SB was not related in any way to Respondent's representation of her. AFFCL ¶ 55-56; TR 95-96, 114, 116-17.

- At the time of the overdraft, all of the funds in Respondent's lawyer trust account were Respondent's own funds, and there were no client funds at all in the account. AFFCL ¶ 56; TR 53, 95-96, 142-43; EX 7 at 2.

- During the period between May 2004 and July 2005, Respondent regularly made payments from his lawyer trust account to himself and others for business and personal expenses that were not related in any way to the representation of SB or any other client. AFFCL ¶¶ 15-16; EX 7 at 4, EX 7B.

Respondent admitted at his deposition that he "fudged things" in his response to the auditor's formal request for response. AFFCL ¶¶ 57-59; TR 96-98. He admitted that his response was "misleading," that it was "just straight out inaccurate," and that "the reading of it's different than, you know, the facts." AFFCL ¶¶57-59; TR 96-98. Furthermore, Respondent admitted that he "wasn't being fully cooperative" in his response to the auditor's request for response, and that his "misleading" and "inaccurate" response was deliberately calculated to avoid detection of his violations of the RPC:

> Q. And was the letter inaccurate so that you would avoid the Bar Association detecting the fact that you were using the trust account as your personal account?
>
> A. Yes, I didn't want to incriminate myself if I didn't have to. It was just another thing that was happening to me at the time.

AFFCL ¶ 63; TR 98-99, 116.

Based on Respondent's misleading and inaccurate response, the grievance was dismissed and the Association's investigation was closed. AFFCL ¶¶ 60-61; TR 51-55. The grievance would not have been dismissed if Respondent had been truthful about the character of the funds in his lawyer trust account. AFFCL ¶ 61; TR 54-55. Respondent continued to commingle his own funds and those of his clients even after

he opened a business or personal checking account in the summer of 2005. TR 168-70; EX 7 at 4, EX 7C.

A series of trust account overdrafts beginning in May 2005 brought Respondent to the Association's attention again. AFFCL ¶ 4; TR 17, 20-21; EX 7 at 1, EX 10B-10H. This time, the auditor requested records from Respondent to determine whether he was maintaining his lawyer trust account in accordance with RPC 1.14. TR 17, 22-23. Respondent was unable to provide records sufficient to make this determination, so the auditor was obliged to reconstruct the account from various records that Respondent did provide. TR 17, 22-23; EX 7 at 1-2. Using the reconstructed financial records, the auditor conducted an audit of Respondent's lawyer trust account for the period from June 2004 to June 2006. AFFCL ¶ 3; TR 17-20; EX 7, 7A, 7B, 7C.

The audit revealed a number of respects in which Respondent had failed to safeguard client funds and failed to maintain his lawyer trust account in accordance with RPC 1.14. Among them were the following:

- For much of the audit period, Respondent failed to maintain a check register and client ledgers. AFFCL ¶ 5, 12. When he did maintain a check register, Respondent failed to record all transactions, failed to identify transactions by client, failed to keep a running balance, and failed to reconcile his check register with his bank statements. AFFCL ¶ 6. When he maintained client ledgers, Respondent failed to reconcile them. AFFCL ¶ 13; EX 7 at 3.

- Respondent failed to deposit and maintain client funds in his lawyer trust account. AFFCL ¶ 20; EX 7 at 5.

- Respondent used his lawyer trust account for his personal and business expenses, as well as for transactions involving client funds. AFFCL ¶ 15; TR 87-88. Respondent deposited at least $45,000 of his personal funds in his lawyer trust account, and he paid at least $38,000 in personal expenses from that account. AFFCL ¶¶ 16-17; EX 7 at 4.

As a result of these acts and omissions, as well as others, Respondent's lawyer trust account was overdrawn on eight different occasions during the audit period. AFFCL ¶ 19; EX 10A-10H. Even when the account was not overdrawn, there were regular shortages, in the sense that there was less money in the account than Respondent should have been holding on his clients' behalf. AFFCL ¶ 21; TR 42-44, 164-65; EX 7A. Contrary to his testimony, Respondent personally used client funds. AFFCL ¶ 22; TR 133, 163-68. The hearing officer found, based on the evidence, that Respondent had caused serious potential injury to his clients by failing to properly safeguard their funds. AFFCL ¶¶ 27-28, 30-31.

B. PROCEDURAL FACTS

Respondent was charged in the Second Amended Formal Complaint with the following violations of the RPC:

- Failing to maintain adequate records of client funds, in violation of RPC 1.14(b)(3) (Count 1);

- Failing to deposit and/or maintain client funds in his trust account, in violation of RPC 1.14(a) (Count 2);
- Depositing his own funds in his trust account, in violation of RPC 1.14(a) (Count 3);
- Making a misrepresentation to a client, in violation of RPC 8.4(c) (Count 4);
- Taking more fees than he was entitled to, in violation of RPC 1.5 (Count 5); and
- Making a false statement to the Association, in violation of RPC 8.4(c) and/or ELC 5.3(e)(1) (Count 6).

BF 8.

The disciplinary hearing took place on August 22-23, 2007. Just before the hearing, Respondent stipulated to certain facts, as well as to the violation charged in Count 3. TR 8-10; EX 18. On November 27, 2008, the hearing officer filed her Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation. BF 58. The hearing officer concluded that the violations charged in Counts 1-4 and Count 6 were proved, and she recommended a two-year suspension. AFFCL ¶¶ 71-74, 76, 85. On April 15, 2008, the Disciplinary Board adopted the hearing officer's decision. BF 69.

III. ARGUMENT

A. STANDARD OF REVIEW

This Court gives great weight to the hearing officer's findings of fact and her evaluation of the credibility and veracity of witnesses. In re

Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 329-30, 157 P.3d 859 (2007). Challenged findings of fact will be upheld if they are supported by substantial evidence. Marshall, 160 Wn.2d at 330. Unchallenged findings of fact are treated as verities on appeal. Marshall, 160 Wn.2d at 330. Conclusions of law are reviewed de novo, and will be upheld if they are supported by the findings of fact. Marshall, 160 Wn.2d at 331. Although the Court gives great weight to the Disciplinary Board's sanction recommendation, the Court retains ultimate authority for determining the appropriate sanction. In re Disciplinary Proceeding Against Schwimmer, 153 Wn.2d 752, 757, 108 P.3d 761 (2005).

B. THE EVIDENCE AND THE UNCHALLENGED FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(c) AND ELC 5.3(e)(1) AS CHARGED IN COUNT 6

Respondent has not assigned error to or otherwise challenged any of the hearing officer's findings of fact. Consequently, all of the hearing officer's findings of fact are treated as verities on appeal. See Marshall, 160 Wn.2d at 330; RAP 10.3(g). Respondent challenges only the conclusions that Respondent violated RPC 8.4(c) and ELC 5.3(e)(1) as

charged in Count 6.[3] Those conclusions are supported by the evidence and the unchallenged findings of fact, as described below.

1. The Evidence and the Unchallenged Findings of Fact Support the Conclusion That Respondent Violated RPC 8.4(c) as Charged in Count 6

The hearing officer concluded that Respondent violated RPC 8.4(c) as charged in Count 6. AFFCL ¶ 76. RPC 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The purpose of the rule is to "prevent attorneys from actively engaging in misleading conduct," and the rule should be construed broadly to advance that purpose. In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 599, 48 P.3d 311 (2002); In re Disciplinary Proceeding Against McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983).

"Fraud" or "fraudulent" denotes conduct "having a purpose to deceive." RPC Terminology. Although "dishonesty," "deceit," and "misrepresentation" are not defined in the RPC, "a person of common intelligence could be expected to understand the conduct proscribed by the

[3] Respondent asserts, as an aside, that Count 4 "should also be overturned," but he admits that he "does not specifically challenge" any finding or conclusion pertaining to Count 4. Respondent's Brief at 2. Furthermore, Respondent provides no argument why the hearing officer's conclusion pertaining to Count 4 is not supported by the findings of fact, nor any argument why any of the related findings of fact are not supported by the evidence. A claimed error unsupported by any argument in the brief should not be considered. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

rule." Florida Bar v. Ross, 732 So. 2d 1037, 1042 (Fla. 1998). When interpreting the RPC, words are given their ordinary meanings. In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 344, 126 P.3d 1262 (2006) (Sanders, J., concurring). The ordinary meaning of "dishonest" is "characterized by lack of truth, honesty, probity or trustworthiness or by an inclination to mislead, lie, cheat or defraud." Webster's Third New International Dictionary 650 (2002). "Deceit" means "the act or practice of deceiving" or "an attempt to deceive: a declaration, artifice, or practice designed to mislead another." Id. at 584. "Misrepresentation" means "an untrue, incorrect, or misleading representation," "a representation by words or other means that under the existing circumstances amounts to an assertion not in accordance with the facts." Id. at 1445.

The evidence and the unchallenged findings of fact support the conclusion that in his response to the auditor's formal request for response, Respondent engaged in dishonesty, fraud, deceit, and misrepresentation as those terms are commonly understood. First, Respondent asserted that the overdraft occurred as a result of "failing to record [a check] into the computer." EX 2. That assertion was meant to imply, and did imply, that Respondent's practice was to record checks on a computer. But in fact Respondent was not recording any of his trust

account transactions on a computer at that time. AFFCL ¶ 54; TR 32-33, 94, 186-87; EX 16F. Respondent's assertion was therefore a "misleading representation," "a declaration . . . designed to mislead," and "characterized by . . . an inclination to mislead." In other words, it was an act of *dishonesty*, *deceit*, and *misrepresentation*. Webster's, supra, at 650, 584, 1445.

Similarly, Respondent asserted that the overdraft occurred as a result of "making a separate check payment to a client." EX 2. That assertion was meant to imply, and did imply, that the payment at issue was somehow related to Respondent's representation of the payee. But in fact, the $300 payment to SB was not related in any way to Respondent's representation of her. AFFCL ¶ 55-56; TR 95-96, 114, 116-17. Respondent's assertion was therefore another act of *dishonesty*, *deceit*, and *misrepresentation* as those terms are commonly understood. See Webster's, supra, at 650, 584, 1445.

Respondent contends that he did not violate RPC 8.4(c) as charged in Count 1 because his response to the auditor's formal request for response was not *false*. Respondent's Brief at 4-5. The ordinary meaning of false is "not corresponding to truth or reality," or "not true." Webster's, supra, at 819. While Respondent's response did contain some half-truths deliberately calculated "to avoid detection of his trust account violations,"

AFFCL ¶ 63, it was also, according to the evidence and the hearing officer's findings of fact, false in at least two respects.

First, Respondent asserted that at the time of the overdraft, "the only funds in the account belonged to the one client." EX 2. But according to the evidence and the hearing officer's findings of fact, at the time of the overdraft, all of the funds in Respondent's lawyer trust account were Respondent's own funds, and there were no client funds at all in the account. AFFCL ¶ 56; TR 53, 95-96, 142-43; EX 7 at 2. Respondent's assertion was therefore "not corresponding to truth or reality" and "not true." In other words, it was *false*. See Webster's, supra, at 819.

Second, Respondent asserted that at the time of the overdraft, "all payments were to or for the benefit of that client." EX 2. But according to the evidence and the hearing officer's findings of fact, during a fifteen-month period that included the January 14, 2005 overdraft, Respondent regularly made payments from his lawyer trust account to himself and others for business and personal expenses that were not related in any way to the representation of SB or any other client. AFFCL ¶¶ 15-16; EX 7 at 4, EX 7B. Respondent's assertion was therefore "not corresponding to truth or reality" and "not true," or simply stated, *false*. See Webster's, supra, at 819.

Indeed, in light of Respondent's own admissions that his response was "just straight out inaccurate" and that "the reading of it's different than, you know, the facts," it is difficult to understand how Respondent can seriously maintain that his assertions were not false. Apparently, Respondent relies on the hearing officer's attempt, in her conclusions of law, to distinguish this case from In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 72 P.3d 173 (2003), on the grounds that this case, unlike Whitt, did not involve the fabrication of "false documents."[4] AFFCL ¶ 76. Although the distinction itself is of dubious significance,[5] the conclusion in AFFCL ¶ 76 is supported by the findings of fact *only* if "false" is understood in the sense of "being other than what is purported or apparent" or "not genuine or real." See Webster's, supra, at 819. If "false" is understood in the sense of "not corresponding to truth or reality," or "not true," then the conclusion in AFFCL ¶ 76 is not supported by the findings of fact. For although Respondent's January 28, 2005 letter to the Auditor was what it purported to be—a January 28, 2005 letter to the Auditor—the statements made in that letter were, according to the hearing officer's findings of fact, "not corresponding to truth or reality"

[4] In Whitt, 149 Wn.2d at 711, 719, the respondent lawyer attempted to deceive the Association by making false statements in her response to a request for information, and also by fabricating "false documents," namely notes and calendar entries, to support her false statements.

[5] See infra pp. 27-28.

and "not true," or in other words, false. AFFCL ¶¶ 15-16, 56; See Webster's, supra, at 819.

2. The Evidence and the Unchallenged Findings of Fact Support the Conclusion That Respondent Violated ELC 5.3(e)(1) as Charged in Count 6

The hearing officer also concluded that Respondent violated ELC 5.3(e)(1) as Charged in Count 6. AFFCL at ¶ 76. ELC 5.3(e)(1) provides:

> Any lawyer must promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation. Upon inquiry or request, any lawyer must . . . furnish in writing, or orally if requested, a full and complete response to inquiries and questions.

In In re Disciplinary Proceeding Against Clark, 99 Wn.2d 702, 707-08, 663 P.2d 1339 (1983), this Court described the purposes of the rule[6] in terms that left no doubt as to its importance:

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[6] In Clark, the Court applied Rule 2.6 of the Disciplinary Rules for Attorneys (DRA), the predecessor of Rule 2.8(a)(1) of the Rules for Lawyer Discipline (RLD) and ELC 5.3(e)(1). DRA 2.6 provided:

> It shall be the duty and the obligation of an attorney who is the subject of a disciplinary investigation to cooperate with the Local Administrative Committee, State Bar Counsel or bar staff as requested, subject only to the proper exercise of his privilege against self-incrimination where applicable, by:
>
> (a) Furnishing any papers or documents;
>
> (b) Furnishing in writing a full and complete explanation covering the matter contained in such complaint; and
>
> (c) Appearing before the Committee at the time and place designated.

> Compliance with these rules is vital. . . . The process of investigating complaints depends to a great extent upon an individual attorney's cooperation. . . . Obviously, unless attorneys cooperate in the process, the system fails and public confidence in the legal profession is undermined. If the members of our profession do not take the process of internal discipline seriously, we cannot expect the public to do so and the very basis of our professionalism erodes. Accordingly, an attorney who disregards his professional duty to cooperate with the Bar Association must be subject to severe sanctions.

Disciplinary rules must be construed broadly to advance the purposes for which they were adopted. McGlothlen, 99 Wn.2d at 522. When interpreting a court rule, this Court will avoid any reading which would result in "unlikely, absurd, or strained consequences." State v. Chhom, 162 Wn.2d 451, 464, 173 P.3d 234 (2007). Nothing could be more absurd than an interpretation of ELC 5.3(e)(1) that permits a lawyer to discharge his duty to cooperate by making statements that are false, dishonest, deceitful, and misleading in response to a formal request for response under ELC 5.3(e). The duty to furnish a response must include the duty to respond truthfully and accurately, or else the rule serves no purpose. Consequently, the hearing officer's conclusion that Respondent violated ELC 5.3(e)(1) as charged in Count 6 is supported by the evidence and the unchallenged findings of fact.

Even though Respondent admitted that the information he provided in his response was "just straight out inaccurate" and "different than, you

know, the facts," he contends that he did not violate ELC 5.3(e)(1). This is so, according to Respondent, because the false and misleading statements he made in his response to a request for "a complete explanation of the overdraft," EX 1, were mere "surplussage," since "[w]hether [he] was using his IOLTA account funds as his personal account, however egregious, was not inquired of by the Association." Respondent's Brief at 6-7. In other words, a lawyer can discharge his duty to cooperate under ELC 5.3(e)(1) by lying, misleading, and misrepresenting the facts so long as his lies, half-truths, and misrepresentations are not made in direct response to a specific question posed to him by the Association. In light of the purposes and importance of ELC 5.3(e)(1), as well as the rules of statutory construction, the Court should find such an interpretation repugnant. See Chhom, 162 Wn.2d at 464; McGlothlen, 99 Wn.2d at 522; Clark, 99 Wn.2d 707-08.

Respondent also relies on Bronston v. United States, 409 U.S. 352, 352-53, 362, 93 S. Ct. 595, 34 L. Ed. 2d. 568 (1973), which holds that a statement that is "literally true but not responsive to the question asked and arguably misleading by negative implication" will not support a perjury conviction under 18 U.S.C. § 1621. But Respondent was not charged with committing perjury, and ELC 5.3(e)(1) requires more of a lawyer than to refrain from making statements that would constitute

perjury if made under oath. The Bronston court itself observed that misleading statements that would not constitute perjury might nonetheless be criminally fraudulent:

> Petitioner's answer is not to be measured by the same standards applicable to criminally fraudulent or extortionate statements. In that context, the law goes 'rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations.' In contrast, 'under our system of adversary questioning and cross-examination the scope of disclosure is largely in the hands of counsel and presiding officer.'

Bronston, 409 U.S. at 358 n.4 (citations omitted). In this case, Respondent himself carefully selected and arranged the misrepresentations in his response to the Association. It should not be necessary for the Association to cross-examine and audit every lawyer with a trust account overdraft to be reasonably assured of a truthful explanation. Bronston simply has no relevance to this case.

C. DISBARMENT IS THE APPROPRIATE SANCTION

The ABA Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) govern sanctions in lawyer discipline cases. Marshall, 160 Wn.2d at 342. First, the Court considers whether the Board determined the correct presumptive sanction, considering the ethical duty violated, the lawyer's mental state, and the actual or potential injury caused by the lawyer's misconduct. Id. Next, the Court considers

the aggravating or mitigating factors. Id. Finally, the Court determines whether the degree of unanimity among Board members and the proportionality of the sanction justify a departure from the Board's recommendation. Id. An appeal from the Disciplinary Board's decision carries with it the risk that the Court may increase the Board's recommended sanction. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 84-85, 960 P.2d 416 (1998); see also Whitt, 149 Wn.2d at 710.

1. The Presumptive Sanction

ABA Standards std. 7.0 applies to violations of RPC 8.4(c) and ELC 5.3(e)(1) where a lawyer engages in conduct involving dishonesty, fraud, deceit or misrepresentation to circumvent the disciplinary process. See Whitt, 149 Wn.2d at 719.[7] The presumptive sanction is disbarment when "a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a personal benefit for the

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[7] In Whitt, 149 Wn.2d at 719, this Court applied ABA Standards std. 7.0 to violations of RPC 8.4(c) and RLD 2.8(b)(3). RLD 2.8(b)(3) provided: "Failure of a lawyer to cooperate fully and promptly with an investigation as required by section (a) of this rule shall also constitute grounds for discipline." RLD 2.8(a)(1), the precursor of ELC 5.3(e)(1), provided:

> **Duty To Furnish Prompt Response.** It is the duty of every lawyer promptly to respond to any inquiry or request made pursuant to these rules for information relevant to grievances or matters under investigation concerning conduct of a lawyer. Upon such inquiry or request, every lawyer:
>
> (1) Shall furnish in writing, or orally if requested, a full and complete response to inquiries and questions;

lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." ABA Standards std. 7.1; Whitt, 149 Wn.2d at 719.

The hearing officer found that Respondent knowingly engaged in conduct that is a violation of a duty owed as a professional. AFFCL ¶ 64. The hearing officer also found that Respondent did so "to avoid detection of his trust account violations." AFFCL ¶ 63. Those unchallenged findings of fact are verities on appeal and are, moreover, amply supported by the evidence discussed above, evidence that includes Respondent's own admissions. The finding that Respondent acted "to avoid detection of his trust account violations" is in essence a finding that he acted "to obtain a personal benefit" for himself. ABA Standards std. 7.1; see Whitt, 149 Wn.2d at 719 (ABA Standards std. 7.1 applied to lawyer who "intended to deceive the disciplinary process in order to avoid disciplinary action"). In Whitt, 149 Wn.2d at 719-20, this Court held that such conduct causes serious or potentially serious injury to the client, the public, and the legal system. As this Court observed:

> Falsifying information during an attorney discipline proceeding is one of the most egregious charges that can be leveled against an attorney. Ms. Whitt harmed her client by casting doubt on his claims, harmed the public by jeopardizing the reputation and perception of the legal system as a whole, and harmed the legal system by attempting to circumvent the disciplinary process to evade

> responsibility for her misconduct. As such, disbarment is justified . . . .

Whitt, 149 Wn.2d at 719-20 (citation omitted).

The hearing officer concluded that the presumptive sanction was suspension under ABA Standards std. 7.2. AFFCL ¶ 79. But in light of the hearing officer's findings of fact and this Court's holding in Whitt, that conclusion is incorrect. Because Respondent acted knowingly with the intent to "to avoid detection of his trust account violations," AFFCL ¶ 63, the presumptive sanction is disbarment under ABA Standards std. 7.1. See Whitt, 149 Wn.2d at 719-20.

2. Aggravating and Mitigating Factors

The hearing officer found four aggravating factors under ABA Standards std. 9.22:

> (b) dishonest or selfish motive;
> (c) a pattern of misconduct;
> (d) multiple offenses;
> (i) substantial experience in the practice of law.

AFFCL ¶ 83. Those findings are unchallenged and are therefore verities on appeal.

The hearing officer also found five mitigating factors under ABA Standards std. 9.32:

> (a) absence of a prior disciplinary record;
> (c) personal or emotional problems;
> (d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(g) character or reputation;
(k) imposition of other penalties or sanctions.

AFFCL ¶ 84. Of these five, two are unsupported by the law and the evidence.

a. Personal or Emotional Problems

Respondent offered evidence of personal financial problems and health problems that he experienced before and during the audit period. TR 84-86, 160-61. But personal financial problems are not a mitigating factor, and a lawyer must establish a connection between his personal problems and his ethical misconduct. In re Disciplinary Proceeding Against Trejo, 163 Wn.2d 701, 731, 185 P.3d 1160 (2008); In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 591, 173 P.3d 898 (2007). Even where a connection is established, personal and emotional problems are given little weight if they did not actually *cause* the misconduct. In re Disciplinary Proceeding Against Poole, ___ Wn.2d ___, 193 P.3d 1064, 1074-75 (2008). Here, Respondent established no connection at all between his health problems and his decision to provide false and misleading information to the Association "to avoid detection of his trust account violations." AFFCL ¶ 63.

b. Imposition of Other Penalties or Sanctions

As examples of "other penalties or sanctions" under ABA Standards std. 9.32, the Commentary to the ABA Standards cites In re

Lamberis, 93 Ill.2d 222, 443 N.E.2d 549 (1982) (sanction for plagiarism mitigated because disciplinary sanctions were imposed by University), and Matter of Garrett, 272 Ind. 477, 399 N.E.2d 369 (1980) (sanction for neglect mitigated because prior disciplinary suspension was extended). ABA Standards, Commentary to std. 9.32. In this case, there is no evidence whatsoever that any other penalties or sanctions were imposed on Respondent for his ethical misconduct.

c. Summary

The presumptive sanction should be imposed unless the aggravating or mitigating factors are sufficiently compelling to justify a departure. In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 96, 101 P.3d 88 (2004). In light of the four aggravating factors, there is nothing sufficiently compelling about the three mitigating factors in this case that would justify a departure from the presumptive sanction of disbarment.

3. Unanimity and Proportionality

After determining the presumptive sanction and considering the aggravating and mitigating factors, the Court considers whether the sanction is appropriate in light of the two remaining Noble[8] factors. Trejo,

[8] In re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 667 P.2d 608 (1983).

163 Wn.2d at 734. The two Noble factors to be considered are (1) the Board's degree of unanimity and (2) the proportionality of the recommended sanction to the misconduct. In re Disciplinary Proceeding Against Stansfield, ___ Wn.2d ___, 187 P.3d 254, 265 (2008); Trejo, 163 Wn.2d at 734. In In re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 256-59, 66 P.3d 1057 (2003), this Court discarded the other three Noble factors, including "the effect of the sanction on the attorney." Respondent's argument concerning that factor is therefore irrelevant. See Respondent's Brief at 16-17.

a. Unanimity

In general, the Board's unanimous sanction recommendation is entitled to great deference and should be affirmed unless this Court can articulate a specific reason for rejecting it. In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 538, 542, 173 P.3d 915 (2007); In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004). In this case, the Board unanimously adopted the hearing officer's recommendation of a two-year suspension. As argued above, however, the hearing officer's recommendation was based on a misapplication of the ABA Standards. Based on the hearing officer's findings of fact and this Court's holding in Whitt, the presumptive sanction is disbarment under ABA Standards std. 7.1. The hearing

officer's misapplication of the ABA Standards provides a specific reason for rejecting the Board's recommendation of a two-year suspension in favor of disbarment.

b. Proportionality

In general, this Court attempts to impose sanctions that are "roughly proportionate" to sanctions imposed in other similar cases. In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 334, 144 P.3d 286 (2006). In proportionality review, the Court considers whether the recommended sanction is appropriate by comparing the case at hand with other similar cases in which the same sanction was either approved or disapproved. In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 763, 82 P.3d 224 (2004). Respondent bears the burden of proving that the recommended sanction is disproportionate. In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 763, 821, 72 P.3d 1067 (2003).

Respondent contends that a two-year suspension would be disproportionate to sanctions imposed in other similar cases. To establish this, Respondent must cite to other similar cases in which a two-year suspension was disapproved. But none of the cases cited by Respondent are *similar* cases, because none of them involve a lawyer who tried to deceive the disciplinary authority by making false, dishonest, deceitful, and misleading representations in response to a formal request for

information under ELC 5.3(e). The only cases Respondent cites involving a lawyer's failure to cooperate are cases in which the lawyer failed to respond to a request for information,[9] not cases like this where the lawyer responded with false, dishonest, deceitful, and misleading statements.

There is one case, and only one case, that is similar to this case in which a two-year suspension was disapproved. That case is Whitt. In Whitt, 149 Wn.2d at 719, as in this case, the lawyer intended to deceive the disciplinary authority by making false and misleading representations in the course of an investigation. She took the additional step of fabricating evidence, but that is a not a meaningful distinction. For a lawyer like Respondent who makes false and misleading representations during a disciplinary investigation is not entitled to a downward departure from the presumptive sanction of disbarment merely because he did not fabricate evidence, as well.[10] In Whitt, 149 Wn.2d at 710, the Disciplinary

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[9] See In re Disciplinary Proceeding Against DeRuiz, 152 Wn.2d 558, 566-67, 578, 99 P.3d 881 (2004); In re Disciplinary Proceeding Against Burtch, 112 Wn.2d 19, 25, 770 P.2d 174 (1989); Clark, 99 Wn.2d at 704-05.

[10] Respondent may argue that disbarment is disproportionate because Whitt's conduct was worse than his own. But the form of that argument is fundamentally flawed. Just because one lawyer can point to a second lawyer who was disbarred for misconduct even worse than his own, it does not follow that the first lawyer does not also deserve to be disbarred. If it were so, then only one lawyer would ever deserve disbarment: the one whose misconduct was the worst. Respondent cannot carry his burden of proof by pointing to disbarred lawyers who did worse things than he has done; rather, he must show that there are cases sufficiently similar to his own in which disbarment was disapproved by this Court. This he cannot do.

Board recommended a two-year suspension, but this Court unanimously rejected that recommendation in favor of disbarment. Proportionality review and a correct application of the ABA Standards lead to the same result in this case.

IV. CONCLUSION

Internal investigation and self-discipline are at the very heart of the legal profession. Clark, 99 Wn.2d at 707. The lawyer discipline system necessarily depends on the lawyer's cooperation. Id. It is for these reasons that providing false and misleading information in the course of a disciplinary investigation "is one of the most egregious charges that can be leveled against" a lawyer. Whitt, 149 Wn.2d at 720. In this case, according to the evidence and the unchallenged findings of fact, that charge has been proved.

In most cases, a lawyer who is the subject of a disciplinary investigation provides accurate and truthful information in response to a request. But for those few, like Respondent, who may be inclined to thwart the lawyer discipline system through acts of dishonesty, fraud, deceit, and misrepresentation, a strong deterrent is needed to protect the public and the profession. If a lawyer like Respondent believes that the sanction for deceiving the disciplinary authority may be no worse than the sanction he would receive for the misconduct that he attempts to conceal,

then he will be all the more likely to lie, deceive, misrepresent and conceal.

In providing false and misleading information to the Association, Respondent acted knowingly with the intent to "avoid detection of his trust account violations." AFFCL ¶¶ 63-64. The presumptive sanction is therefore disbarment under ABA Standards std. 7.1. In light of the presumptive sanction, the aggravating and mitigating factors, and due consideration of this Court's decision in Whitt, the Association respectfully requests that Respondent be disbarred.

RESPECTFULLY SUBMITTED this 10th day of November, 2008.

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